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IN THE HIGH COURT OF JUDICATURE AT BOMBAY
CIVIL APPELLATE JURISDICTION

CIVIL APPLICATION NO. 4024 OF 2007
IN
FIRST APPEAL NO.1115 OF 2001

1. Shri Dattatrya Mahadeo Kuray .. Appellant.
2. Sau.Indira Dattatrya Kuray (Orig.Defendant Nos. 1 & 2)

Verses

1. Smt.Sneha Kishor Kuray .. Respondent
2. Master Kunal Kishor Kuray (Orig.Plaintiff Nos. 1 & 2)
3. Shri Manoj Dattatrya Kuray .. Respondent No.3 (Orig.Defendant No.3)

Mr. B.D.Joshi for Appellants. .
Mr.D.N.Salvi for respondent nos.1 and 2. .

CORAM : ANOOP V.MOHTA, J. .
DATE : 1ST NOVEMBER, 2007. .

P.C. :-

. This is an application filed by the original defendant and prayed as under :

(a) The petitioner No. 1 may be permitted to sale

flat No.6 at Swami Samarth Apartment, Plot No. 240 survey No.97 at Busari Colony, Kothrud Pune;

(b) The petitioner No.2 may be permitted to sale flat No. 1 in Indrashree Co-Operative Housing. Society, Plot No. 70, Dahanukar Colony, 8th road, Kothrud Pune.

2. Respondent nos. 1 and 2 are the original plaintiffs. After considering the material placed on record with reference to plot no. six the findings are as under :

. "From the evidence of Dattatraya Kuray, it appears that flat at Swami Samarth society Bhusari colony is his self acquired property. He produced the deed of assignment at Exh.155. Original deed of assignment is duly proved which indicate that the flat No.6 in Bhusari colony was acquired by defendant no.1. He produced 3 receipts of Exh.175 which indicate that he paid consideration time to

time to M.S.Construction for the purchase of said flat. Certificate issued by Deepak Kale (Exh.176) indicate that the flat is owned by Dattatrya Kuray. The possession letter Exh.171 also supports the case of defendant No.1 that he acquired possession of flat No.6 as an owner. Therefore, it is crystal clear that flat or Bhusari colony described in schedule IV-2 is the self acquired property of defendant No.1. According to defendant No.1 a row house at sector No.2 Airoli, New Bombay is his self acquired property. He produced on record the original letter of allotment at Exh.156 which indicate that the row house was allotted to defendant No. 1 by Shri Siddhi Ganesh Co-operative Housing Society. He produced relevant correspondence of the society at Exh.57 to 174. The share certificate produced at Exh.178 also supports to the case of defendant No.1. The payment receipts produced at Exh.179 also indicate that the defendant No. 1 made payment to said society for the purchase of row house. There is no reason to discard the evidence of defendant No.1 therefore, it is

established by defendant that row house described in schedule IV(3) of the plaint is self acquired property of defendant No.1".

3. "In so far as finding referring to plot no. 1 on plot no. 70. From the evidence of Dattatrya Kuray vide Exh.14 it appears that plot N.70 Indrashri Society Kothrud was purchased by defendant No.2 in 1966 and the said plot was given for development and against the same she had taken 3 flats. One flat is standing in her own name and two flats were standing in the joint names with herself and Kishor and herself and Manoj. Indira Kuray also corroborated to the purchase of plot No.70 in 1966 in her evidence Exh.143. Manoj Kuray also corroborate to the defendant No. 1 and 2 in his evidence Exh.147. During the cross examination their evidence goes unchallenged. The defendants produced documentary evidence Agreement to sale Exh.186 and sale deed Exh.137. Agreement to sale is dated 9.1.1966 and the sale deed dated 11.7.1966. Both the documents are duly proved. It appears that

the plot No.70 was purchased in the name of defendant No.2 Indirabai from Baburao Ramchandra Desai for the consideration of Rs.9,100/-. The sale deed indicate that on 11.7.1966 Baburao Desai executed registered sale deed in favour of defendant No.2 in respect of plot No.70. Therefore, it is crystal clear that plot No.70 was purchased in the name of defendant No.2 in 1966. From the development agreement dated 6th of January, 1987 it appears that Flat No.70 was given for development to M/s.Parshwa Enterprises in lieu of consideration of 3 flats. The deed of conveyance is produced at Exh.189 which is the certified copy. It appears that on 18.7.1991 the defendant No.2 Indira Kuray executed conveyance of plot No.70 in favour of Indrashri Society, I have already observed that the evidence of defendants supported by documentary evidence and when the plaintiff admitted that she do not know how the properties were acquired there is no reason to discard the evidence of defendants. Therefore, it appears that plot No.70 was purchased in the name of defendant No. 2 in 1966 and it was

given for development to Parshwa enterprises and in consideration defendant No. 2 had taken 3 flats in Indrashri Society one flat is standing in her name. One flat is standing in joint name of defendant No. 2 and Kishor Kuray and third flat is standing in the joint name of defendant No,2, then there is no substance in the say that it is an ancestral property. No any nucleus of ancestral property or joint family property is pleased and established by the plaintiff. In such circumstances I hold that plot No.70 is not the ancestral property. However, it appears that one flat in Indrashri Society is standing in the joint name of defendant No.2 and Kishor Kuray. From the case of defendant No.2 and Kishor Kuray. From the case of defendant it appears that though the flat is standing in joint name, then also it was taken as a consideration of plot N.70, which was owned by defendant No.2. In short, defendant No.2 came with the case that flat which is standing in or acquired by her and out of her own income. However, taking into consideration Benami transactions Prohibition Act, defendant cannot raise

such defence. As the flat No.2 is standing in joint name of Indirabai and Kishor Kuray to that extent. All the plaintiffs have right of inheritance being the heirs of Kishor. Therefore, I hold that plot No.70 is not the ancestral property. However, flat No.2 is standing in the joint name of Kishor and Indirabai and plaintiffs have right of inheritance to the extent of share of Kishor Kuray. I record my finding on both the issues accordingly".

4. Both the appeals i.e. 1115 of 2005 and 1116 of 2005 having filed by he original defendant nos. 1 and 2. There is no cross appeals or any challenge made by the original plaintiff. The findings are given to that reference to the above fact and about the property taken finally at the stage of the proceeding.

5. The appeals are admitted and pending for hearing.

6. The applicant no. 1 is of 78 years old

and applicant no. 2 is about 70 years. There is no objection of any kind from the plaintiff that is respondent nos. 1 and 2 to this application. None appeared for respondent no.3 who is son of the applicant/original defendant. Therefore, considering the above finding as well as the age of the appellant, I am of the view that the appellants are aged and therefore this application is allowed in terms of prayer clause (a) and (b).

7. The learned counsel for the original plaintiff request for early hearing be considered also in view of the fact that he applicant i.e. are about 70 and 78 years old. The matter be listed for final hearing as the matter is ready for hearing. The matter be listed the week commencing 21st January, 2008.

(ANOOP V. MOHTA, J.)